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check, to show that the teller's authority to certify embraced cases in which the drawer had no funds. "If his authority as between himself and his principal was in fact restricted to cases in which the drawer had sufficient funds, and he either intentionally or by mistake transcended that authority by marking the check good when the drawer thereof had no funds, the consequences of his blunder should be visited, not upon the innocent

holder of the check so certified, but upon the agent's employers, who put it in his power to commit the wrong:" *Hill v. Nation Trust Co.*, 108 Penn. St. 1 (1885). See also, *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125 (1857); *Merchants' Bank v. State Bank*, 10 Wall. 604, 646 (1870); *Espey v. Bank of Cincinnati*, 18 Wall. 604 (1873).

EDGAR G. MILLER, JR.

Baltimore.

Supreme Court of Ohio.

FLANDERS v. BLANDY.

A father set apart certain United States bonds as a gift to his daughter. The bonds were never delivered to her, but remained in the possession and under the dominion and control of the father, with whom they were left at her request and with his assent for safe-keeping. He collected and transmitted to her the accruing interest on the bonds up to a certain date, but thereafter, and without her knowledge, authority or consent, invested the bonds in a business in which he had become interested. He then wrote to his daughter a letter, which by his direction was duly stamped as a contract, in which he promised, if she did not elect to accept the investment in lieu of the bonds, he would retain it himself, and pay her two thousand dollars, with interest. The daughter accepted the written promise in lieu of the bonds, and upon the death of her father, brought an action on the promise against his representative, to recover the two thousand dollars and interest. *Held*, 1. That there was no good and sufficient consideration to support the promise on which the suit was brought. 2. That the transaction between the father and daughter was not a valid gift *inter vivos*. 3. That there was no valid declaration of trust of the bonds in favor of the daughter.

ERROR to the District Court of Muskingum county.

The original action was brought by Amanda B. Flanders, the plaintiff in error, against Frederick J. L. Blandy, administrator on the estate of her father, Henry Blandy, deceased, to recover the sum of \$2000, with interest thereon from the 1st day of April 1866, upon an alleged promise to her in writing, from her father, to pay her the same, contained in a letter to her from him dated April 19th 1866. After the commencement of the action Frederick J. L. Blandy resigned his trust, and George L. Phillips was appointed administrator, and substituted as defendant in his stead. The remaining facts necessary to be stated are found in the opinion of the court. The defendant demurred to the petition. The court sus-

tained the demurrer and rendered judgment against the plaintiff. To reverse the judgment of the Court of Common Pleas, the plaintiff prosecuted a petition in error in the District Court, where the judgment was affirmed. To reverse the decision of the District and Common Pleas Courts, the present petition in error is prosecuted.

Frank H. Southard, for plaintiff in error.

G. L. Phillips, for defendant in error.

DICKMAN, J.—As appears from the original petition, the decedent, Henry Blandy, desiring in his lifetime to make some provision for the support and maintenance of his daughter, the plaintiff in error, purchased and set apart as a gift to her certain United States seven-thirty bonds of the par value of two thousand dollars, and bearing interest at the rate of six per cent. per annum. These bonds were never delivered to the daughter. She never had manual possession of them, but by her request and his assent they were left in the manual possession and under the dominion and control of the father for safe-keeping. As her residence was distant from his home, he collected and transmitted to her the accruing interest down to the 1st day of April 1866. About that time he became interested in the Cashmere-goat business, and being under the impression that an investment in that branch of business would be more profitable to his daughter than the ownership of the bonds, invested them in that business, but without consultation with her, and without her knowledge, authority or consent. After making the investment, and on the 19th day of April 1866, by letter of that date to the plaintiff, stamped as a contract by his direction with a United States internal revenue stamp duly cancelled, the decedent promised and agreed to and with the plaintiff, that in case she did not elect to accept the investment in the proposed business in lieu of the bonds, he would retain the investment himself and pay to her in place of the bonds the sum of two thousand dollars, with interest thereon from the 1st of April 1866. The plaintiff accepted the offer and promise so made in writing, and having notified the decedent of her acceptance, he thereupon retained the investment as his own. It was upon the promise contained in the letter of April 19th 1866, that the original action was founded.

If the promise in writing by Henry Blandy to pay the two thousand dollars and interest, was not supported by a good and suf-

ficient consideration, no right of action accrued to the plaintiff. It is contended, however, that such a consideration was furnished in the government bonds which the decedent invested in his business. The plaintiff claims that the transaction between her father and herself was no less than a valid gift of the bonds to her by him in his lifetime. We think, however, that she acquired no title to or beneficial interest in the bonds, and that he was never divested of his absolute ownership therein.

A gift *inter vivos* has been defined as an immediate, voluntary and gratuitous transfer of his personal property by one to another. It is essential to its validity that the transfer be executed, for the reason that there being no consideration therefor, no action will lie to enforce it. A gift *inter vivos* has no reference to the future, but goes into immediate and absolute effect. To render the gift complete, there must be an actual delivery of the chattel, so far as the subject is capable of such a delivery, and without such a delivery, the title does not pass. If the subject be not capable of actual delivery, there must be some act equivalent to it. "The necessity of delivery," says Chancellor KENT, "has been maintained in every period of the English law." The donor must part not only with the possession, but with the dominion and control of the property. An intention to give is not a gift, and so long as the gift is left incomplete, a court of equity will not interfere and give effect to it: *Gray v. Barton*, 55 N. Y. 68; *Martin v. Funk*, 75 Id. 134; 2 Kent Com. 438; *Noble v. Smith*, 2 Johns. 52; *Pearson v. Pearson*, 7 Id. 26; *Grangiac v. Arden*, 10 Id. 293; *Hooper v. Goodwin*, 1 Swanst. 486; *Picot, Adm'r, v. Sanderson*, 1 Dev. 309; *Pennington v. Gettings*, 2 Gill & Johns. 208; *Gano v. Fisk*, 43 Ohio St. 462. That the rights of creditors may not be prejudiced; that the donor may not be circumvented by fraud; that he may be protected from undue influence, which would result in an unequal and unjust distribution of his estate; that efficacy may not be given to donations made under legal incapacity; as well as on other grounds, gifts *inter vivos*, like gifts *causa mortis*, in anticipation of death, are watched with caution by the courts, and to support them clear and convincing evidence is required.

The record discloses that Henry Blandy, though he intended to give, never consummated a valid gift of the bonds to his daughter. They were in his possession, and under his dominion and control, until he invested them in the Cashmere-goat business. They were

property of such a nature that they were capable of actual delivery to his daughter, if he had seen fit so to deliver them. But he never delivered them to her, actually or otherwise, and when the occasion arose on which to use them in his business, he then, in the exercise of an absolute ownership, appropriated them without her knowledge, authority or consent. It is alleged that the bonds were left with him for safe-keeping ; but he was the custodian of property which the law regarded as his own, until, for a valuable consideration, or by a perfected gift, he might conclude to divest himself of all title thereto. His acts indicate that he preferred to hold on to the bonds to meet any contingency which might necessitate him to use them, and not to place them irrevocably beyond his reach. His transmission of the accruing interest to his daughter might indicate an intention to donate the bonds themselves ; but while the one may be incident to the other, the two are essentially separable and distinct, and a delivery of the one is not a delivery of the other. If, before the decedent invested them in his business, the plaintiff had demanded possession of the bonds and been refused, she could have shown no consideration establishing a title whereby she might maintain an action, to recover either the bonds or their value in money. An agreement proved to set apart the bonds for her support and maintenance would not have availed. An agreement to give for the consideration of love and affection, whether the gift is to be of goods and chattels or of a chose in action, neither transfers the property to the donee, nor secures him a right by suit to compel a completion of the contract : *Carpenter v. Dodge*, 20 Vt. 595.

The original petition contains an allegation that the bonds were a gift from the decedent. But it is further contended that there was not only a gift, but that the father constituted himself a trustee for his daughter. In this connection the language of the court in *Young v. Young*, 80 N. Y. 430, finds a direct application to the present case. "The transactions," says RAPALLO, J., in delivering the opinion of the court, "is sought to be sustained in two aspects. First, as an actual executed gift ; and secondly, as a declaration of trust. These positions are antagonistic to each other, for if a trust was created, the possession of the bonds and the legal title thereto, remained in the trustee. In that case there was no delivery to the donee, and consequently no valid executed gift ; while if there was a valid gift, the possession and legal title must

have been transferred to the donee, and no trust was created." It is manifest that there was an inchoate gift of the bonds by the decedent which he never completed; but we find nothing that can be construed into a declaration that he regarded himself as standing in reference to the bonds, in a fiduciary relation to his daughter. If a gift is imperfect at law, and for want of consideration cannot therefore be enforced, a court of equity will not aid the donee by construing it into a declaration of trust. In *Milroy v. Lord*, 4 De Gex, F. & J. 274, in referring to the modes of making a voluntary settlement, the principle is announced, that if the settlement is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. The owner of property that is meant to be donated may, at the last moment before delivering it, change his mind, and in such case, equity will not virtually divest him of his property by creating a trust in favor of a volunteer. By the civil law, however absolutely a donation *inter vivos* might have been made, yet, if the object of the donor's bounty proved ungrateful, he was permitted in certain specified cases to revoke the donation. But by the common law, when the gift is perfect by delivery and acceptance, it is then irrevocable, and hence, until there is a final delivery of the subject, the donor will continue vested with the title.

The leading case on this point is *Antrobus v. Smith*, 12 Ves. 39, in which Gibbs Crawford made the following endorsement upon a receipt for one of the subscriptions in the Forth and Clyde Navigation: "I do hereby assign to my daughter Anna Crawford, all my right, title and interest of and in the enclosed Call, and all other calls, of my subscription in the Clyde and Forth Navigation." As this was not a legal assignment, and was therefore without effect as a gift, it was argued that the father meant to make himself a trustee for his daughter of the shares. But Sir W. GRANT, M. R., observed, "Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect

to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is *locus pœnitentiæ* as long as long as it is *incomplete*."

In *Jones v. Lack*, L. R., 1 Ch. 25, a check for 900*l.* was put by the father into the hands of his child, signifying in strong terms his intent to give *in præsentî* the check to the child. He subsequently took the check and locked it up, saying he should keep it for the child, and died the same day. A bill was brought in behalf of the child against his father's representatives, to enforce his interest in the check as a trust. Lord CRANEWARTH said: "This case turns on a very short question, whether the father intended to make a declaration that he held the property in trust for the child; and I cannot come to any other conclusion than that he *did not*. * * * It was all very natural, but the father would have been very much surprised if he had been told that he had parted with the 900*l.* and could no longer dispose of it; and that the child, by his next friend, could have brought an action of trover for the check." See *Carr v. Silloway*, 111 Mass. 24.

It is obvious and well settled by authority, that before the owner can be held as a trustee for the benefit of a mere volunteer, there must be a distinct, perfect and unequivocal declaration of trust. There should be an expression of an intention to become a trustee, not that the owner should use technical words or language, but he should declare in unmistakable terms that he meant to stand in a fiduciary relation to the object of his bounty. The record shows no such declaration by the decedent, and his acts were wholly inconsistent with the idea of making himself a trustee. There are no reasonable grounds for concluding that when he invested the bonds in his business, without the knowledge of his daughter, he deemed himself as acting under a trust which he had assumed and declared. If in the alleged purchase and setting apart of the bonds as a gift to his daughter, and assenting to their being left in his custody, he had made use of words expressing a gift which was never perfected by delivery, such words would have shown an intention to give property over to another, and not to retain it in his (the donor's) hands, for any purpose, fiduciary or otherwise: *Richards v. Delbridge*, L. R., 18 Eq. 11, 15. In the case last cited, Delbridge, who was possessed of leasehold business premises and stock in trade, purported to make a voluntary gift in favor of his

grandson, E. B. Richards, who was an infant, and assisted him in his business, by the following memorandum signed and indorsed on the lease: "This deed and all thereto belonging, I give to E. B. Richards, from this time forth, with all the stock in trade." The lease was then delivered to the mother of the grandson, in his behalf. It was held by Sir G. JESSEL, M. R., that there was no valid declaration of trust of the property in favor of the grandson. In the same line of decision are numerous other authoritative cases, but we deem it unnecessary to refer to them.

The Court of Common Pleas and District Court did not, in our opinion, err in sustaining the demurrer to the plaintiff's petition, and the judgment of those courts should be affirmed.

Judgment accordingly.

It is doubtless true that, generally speaking, a physical delivery of the thing is essential to constitute a valid gift. At one time it was the rule that an actual manual delivery was necessary, but the courts have since so modified or enlarged it, so as to allow constructive and symbolical deliveries, and when the facts would not establish a delivery, but showed a clear case of gift, the courts seem to have made it effectual, as an equitable assignment or a declaration of trust; so that it could now be said that facts showing an *executed intent* would constitute a sufficient delivery; that is, this rule could be deduced from the cases.

The foregoing opinion shows the opposite view, to sustain which there are some well considered cases.

It is the object of this note to present the other view.

The cases which will be given will show that a delivery is actual or constructive; actual when there is a physical or manual delivery, and constructive when the act or acts of the donor show that he dispossesses himself of the ownership of the thing and vests it in the donee without manual delivery of the thing, as the delivery of the key of a trunk, with a declaration of a gift of the contents: *Marsh v. Fuller*, 18 N. H. 360; *Allerton v. Lang*, 10 Bosw. 362;

Cooper v. Burr, 45 Barb. 9; *Penfield v. Thayer*, 2 E. D. Smith 305; the declaration of gift pointing it out so that donee could take possession: *Allen v. Cowan*, 23 N. Y. 502; *Caldwell v. Wilson*, 2 Spears 75; *Winter v. Winter*, 9 W. R. 747; or the declaration merely, if the donee has possession: *Wing v. Merchant*, 57 Me. 383; *Tenbrook v. Brown*, 17 Ind. 410; or a bank deposit by the delivery of the pass-book: *Camp's Appeal*, 36 Conn. 88; *Hill v. Stevenson*, 63 Me. 364; and in any case where the facts show an executed intention. In the principal case it is held that there is no delivery where the thing is continued in the possession of the donor, even at the request of the donee; that "to render the gift complete there must be an actual delivery of the chattel so far as the subject is capable of such a delivery, and without such a delivery the title does not pass." In *Herr's Appeal*, 5 W. & S. 494, the husband placed coin in a drawer, stated it was for his wife, locked it, and gave the key to his wife. The drawer was the husband's, and he continued for years to have free access to it, and it was held that this was a good delivery. Here there was no actual delivery, and there was not such a delivery as the subject was capable of. This was approved and followed in *Crawford's Appeal*, 61 Pa.

St. 52, where the court state that the question involved was whether the facts showed an *executed intention*, followed by a trust. The facts were that the husband entered on his cash book a certain sum to his wife's credit, and also added the interest as it became due, and told his wife this was for her, and it was held a valid gift; that the intention was executed by the entry on his books, and that he constituted himself a trustee for his wife; citing *Larkin v. Mullin*, 13 Wright 34; *Flowers's Case*, Noy 67. And so where the husband directed the delivery to his wife of certain county bonds when issued, stating that she should have them, and the bonds were subsequently delivered to her: *Whiting v. Barrett*, 7 Lans. 108, ruling that a parol gift of property not *in esse*, or not in the possession or under the control of the donor at the time of the gift, is valid where the donee subsequently and before revocation obtains possession. In *Shower v. Pilck*, 4 Exch. 478, it was held that a mere verbal gift, unaccompanied with delivery, could not be made; but in *Sprattly v. Wilson*, 3 E. C. L. 10, and *Champney v. Blanchard*, 39 N. Y. 111, it was held that it could, as held in *Whiting v. Barrett*. In *Sprattly v. Wilson*, the goods were at York, and the parties were in London, and the donee was allowed to maintain trespass against a stranger upon his constructive possession.

In *Stevens v. Stevens*, 9 N. Y. (2 Hun) 470, it was held that the verbal giving of a note which was in a bureau drawer, presumptively accessible to the husband, was a good delivery; but the verbal gift of a note held by a third person as collateral security for a loan was not; the court seemingly making the distinction that in the former the husband could take or get possession, but not so in the latter case; yet there is no reason why he could not get possession of the latter as well as the former.

A declaration of the intent to give, and an endorsement of the name of the

donee on the back of a lottery ticket, and a subsequent re-affirmation of the gift, was held a valid gift in *Grangiac v. Arden*, 10 Johns. 293; and a declaration by the donor that he gave to the donee his trunk and all that was in it, constituted a valid gift of money in a savings bank, the pass-book of the donor being in the trunk at the time, notwithstanding the donee did not take any actual or manual possession of the trunk or the pass-book (*Penfield v. Thayer*, 2 E. D. Sm. 305), on the ground, it is presumed, that as the donee occupied the same room with the donor, and in which was the subject of the gift, he could take manual possession, or it was in his power to do so. The purchaser of household furniture at a sale under a chattel mortgage, gave it to the wife of the mortgagor, in whose possession and use it was, saying to the wife, "I give you all the property I have purchased this day," was held a valid gift, and against the mortgagor's creditors, although the donor never had possession, had not seen all the furniture purchased, and there was not, at any time, an actual change or transfer of the use or possession: *Allen v. Cowan*, 23 N. Y. 502; 28 Barb. 99. The intent to give, executed, and the power to assume possession by the donee, and not the total exclusion of the power of the donor to resume, is the governing element in such cases; as the handing to the donee (who had lived with the donor for twenty-seven years) the keys of the bureau and trunks, saying, "here are the keys: I give them to you; they are the keys of my trunks and bureau; take them and keep them, and take good care of them; all my property and every thing I give you; you have been a good girl to me. You know I have given it all to you, take whatever you please; it is all yours, but take good care of it," was held in *Cooper v. Burr*, 45 Barb. 9, to be a good delivery and a valid gift of the coin and jewelry in the bureau and trunks, because, as the court stated,

the language and the act "evinced the intention of the donor and placed the donee in the possession of the means of assuming absolute control at the donee's pleasure." In this case there was over ten thousand dollars at stake. The donee lived with the donor, and the declaration was made and keys delivered about six weeks before the donor died. Such declaration and delivery of the key was held sufficient in *Jones v. Selby*, Prec. in Ch. 300; *Noble v. Smith*, 2 Johns. 55; *Smith v. Smith*, 2 Vernon 92; *Chapin v. Rogers*, 1 East 194; *Marsh v. Fuller*, 18 N. H. 360; *Allerton v. Lang*, 10 Bosw. 362; *Penfield v. Thayer*, 2 E. D. Smith 305, holding that it was a symbolical delivery, on the ground that the facts and circumstances were such that the delivery of the key was considered equivalent to actual delivery, in that it gave the means of obtaining the use and command of the subject (*Noble v. Smith*, *supra*), or, in other words, if the thing is placed within the power of the donee by a delivery of the means of obtaining it, it is a good delivery of the thing: *Harris v. Clark*, 3 Comst. 93; *Hunter v. Hunter*, 19 Barb. 635; *Parish v. Stone*, 14 Pick. 206; *Allen v. Cowan*, 28 Barb. 101; *contra*, 2 Kent Com. 438; *Huntingdon v. Gilmore*, 14 Barb. 243; *Woodruff v. Cook*, 25 Barb. 512. The language, "My trunk, up-stairs, and what is in it, I give you; there is enough in it to take care of you for a spell," the trunk being in a room in the common occupancy of the donor and donee, in a boarding-house, followed by the donor immediately quitting the house, without any intimation of an intention to return, though he did return afterwards, was a good delivery: *Penfield v. Thayer*, 2 E. D. Smith 305. And the language in effect stating that whatever the donor had brought to donee's house he did not intend to take away, but should be her's, was a good delivery: *Smith v. Smith*, *supra*; but this was a *nisi prius* case. In *Taylor v. Taylor*, 12 N. Y. (5 Hun)

115, it was held that a manual delivery of the thing given is not necessary, but that a delivery to a third person as trustee or bailee of the donee is sufficient, and that the donor may by an apt declaration to that effect, convert himself into a trustee for the donee; following *Gray v. Barton*, 55 N. Y. 72; but this was an action for conversion of property; though the principle is the same. It was applied in a gift *mortis causa* in *Grymes v. Hone*, 49 N. Y. 17, where the testator owned one hundred and twenty shares of bank stock in one certificate, assigned in writing twenty of the shares to plaintiff, and handed them to his wife, with instructions to be kept by her until his death, and then delivered to the plaintiff. The donor died five years thereafter, and the court held that this was a valid gift and a good delivery, and that a judgment requiring the production of the certificate and a transfer of the twenty shares was proper; because the wife was the agent of the donor, and the trustee or bailee for the donee. And the delivery of the assignment in such a way made the donee the equitable owner, and failure of transfer on the bank's books could not interfere: *Rd. v. Schuyler*, 34 N. Y. 80; *McNeil v. Bank*, 46 N. Y. 325. In *Duffield v. Elwes*, 1 Bligh. N. S. 497, it was held, that in such cases the representatives of the donor were trustees for the donee, by operation of law, to make the gift effectual. This was held in *Ex parte Pye*, 18 Ves. 140; *Kekewich v. Manning*, 1 De G. M. & G. 176, and *Richardson v. Richardson*, L. R., 3 Eq. Ca. 686, and is an extension of the law as laid down by Lord HARDWICKE in *Ward v. Turner*, 2 Ves. Sr. 431.

The following hold that a delivery to a third person is a good delivery to the donee: *Drury v. Smith*, 1 P. Wms. 404; *Sessions v. Moseley*, 4 Cush. 87; *Constant v. Schuyler*, 1 Paige 316; *Borneman v. Sidlinger*, 8 Shep. (Me.) 185; *Wells v. Tucker*, 3 Binn. 366; *Grover v. Grover*, 24 Pick. 261; *Chase v. Redding*, 13

Gray 418; *Bates v. Kempton*, 7 Gray 382; *Westerlo v. De Witt*, 36 N. Y. 340; *Walsh v. Sexton*, 55 Barb. 251.

It was observed by Lord Justice KNIGHT BRUCE, in *Kekewich v. Manning*, 1 De Gex, M. & G. 187, that it is upon legal and equitable principle clear that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have, and has it in his power, to make, in a binding and effectual manner, a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession, or reversionary, or howsoever circumstanced.*"

Having notes made payable to the donee, and the parol declaration by donor that he intended these to be in full as the shares of his children in his property, was held to be a good delivery, and that possession of the notes afterwards by the donor was as trustee for the donees: *Fulton v. Fulton*, 48 Barb. 590; the court holding that "an actual transmutation of possession is not essential where the donor intends to convert himself into a trustee and makes a sufficient declaration to that effect." The same principle is found in *Ex parte Pye*, 18 Ves. 149, where an agent, instead of purchasing an annuity in the name of the donee, as directed, purchased it in the name of the donor, who subsequently declared in writing that the annuity was for donee. Lord ELDON held the donor a trustee for the annuitant. And the same is asserted in *Wheatley v. Purr*, 1 Keen 551; *Meek v. Kettlewell*, 1 Hare, 470; *McFadden v. Jenkyns*, 1 Hare 458; *James v. Bydden*, 4 Beav. 600; *Thorpe v. Owen*, 5 Beav. 224; *Scott v. Simes*, 10 Bosw. 314; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Souwerby v. Arden*, 1 Id. 240; *Van Deusen v. Rowley*, 4 Seld. 360; *Scrugham v. Wood*, 15 Wend. 545.

"Delivery," said Chancellor KENT, "in this as in every other case, must be according to the nature of the thing. It may be constructive. It must be an actual delivery so far as the subject is capa-

ble of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and domain of the subject:" 2 Kent Com. 439. Not exclusively physical, but physical or constructive, as the nature of the case admits. "It is only," said the court in *Fulton v. Fulton*, "when something remains to be done by or in behalf of the donor, which is not done, that the gift fails to take effect," as is shown in *Harris v. Clark*, 3 Comst. 93, and *Irons v. Smalpiece*, 2 B. & Ald. 552.

The act of delivering a note or other obligation of a third person to a donee as a gift, only furnishes evidence that it was intended by the donor as a gift of the money payable thereon. The evidence of that intention may as well be afforded by a plain and unrevoked declaration of the donor as the taking of the note in the name of the donee, or an actual or constructive delivery, the whole question being, did the donor intend to make the gift.

Where the testatrix, during her last illness, sent for her husband, and on his coming into her room handed him a box containing bank and railroad stock, and government bonds belonging to her, and also handed the key, saying that she gave him the box and its contents, and the box, contents and key were taken and retained by him, the court held this to be a good delivery, although no transfer of the stock was signed, and no power authorizing such transfer was signed by her: *Walsh v. Sexton*, 55 Barb. 251; and apparently upon the sole testimony of the husband. The court followed *Westerlo v. De Witt*, 36 N. Y. 340. *Bedell v. Carll*, 33 N. Y. 581, is a similar case; the note was endorsed by the father and handed to his daughter, who retained possession, the only witness being the daughter. This was carried to the extent of allowing the donee to sue the maker in the name of the donor's administrator, and against his consent. *Grover v. Grover*, 24 Pick. 261. In that case the note was

payable to the order of the donor, who, without endorsement or other writing, delivered it to the donee, and it was held, not only that there was a good delivery, but if the donor received the note again with the request that he hold it until the donee call for it or collect it for him, the gift is not disturbed, the donor becoming a trustee for the donee, on the ground, no doubt, that the delivery was an equitable assignment, and the gift became perfect and irrevocable: 2 Kent Com. 438. But was not the endorsement necessary to make a legal transfer of the chose in action. In *Miller v. Miller*, 3 P. Wms. 356, it was held that this could not be done, because no property could pass by delivery, it could only pass by endorsement. In *Snellgrove v. Baily*, 3 Atk. 214, Lord HARDWICKE held that it could be done; gift and delivery without endorsement would constitute a good donation *mortis causa*, or *inter vivos*, because it is an equitable assignment. This doctrine was followed in *Wright v. Wright*, 1 Cowen 598. In *Duffield v. Elwes*, 1 Sim. & Stu. 243, the Vice Chancellor held that a mortgage was not a subject of such gift by delivery, but the House of Lords, in the same case, 1 Bligh N. R. 497, held that it could, as it was an equitable assignment. This doctrine was rejected in *Wilson v. Carpenter*, 17 Wis. 512, and *Green v. Langdon*, 28 Mich. 221; and adopted in *Brown v. Brown*, 18 Conn. 410; *Raymond v. Sellick*, 10 Id. 480; but in none of these are the English cases considered. In 2 Kent Com. 439, it is asserted that as to bills, notes, bonds and other choses in action, an assignment or some equivalent instrument is necessary, and the transfer must be actually executed, which seems to be approved in *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Phipps v. Hope*, 16 O. St. 586; *Knott v. Hogan*, 4 Met. (Ky.) 99; *Carpenter v. Dodge*, 20 Vt. 595; *Taylor v. Staples*, 8 R. I. 170; *Pennington v. Gittings*, 2 Gill & J. 208; *Kidder v. Kidder*, 33 Pa. St. 268; *Bus-*

chian v. Hughart, 28 Ind. 449. But the principle announced in *Duffield v. Elwes*, 1 Bligh 497, seems to be well grounded and sustained, that an executed intention is all that is necessary, and that if the delivery is imperfect, a trust will be enforced as an equitable assignment; *Jones v. Lock*, L. R., 1 Ch. 25; *Kekewich v. Manning*, *supra*; *Roberts v. Roberts*, 15 W. R. 117; *Morgan v. Malleson*, L. R., 10 Eq. 475; *Martin v. Funk*, 75 N. Y. 134; *Bond v. Bunting*, 78 Pa. St. 210; *Wing v. Merchant*, 57 Me. 383; *Bates v. Kempton*, 7 Gray 382; *Sessions v. Moseley*, 4 Cush. 87; *Snellgrove v. Baily*, 3 Atk. 214; *Hale v. Rice*, 124 Mass. 292; *Hill v. Sheibley*, 64 Ga. 529; *Elam v. Keen*, 4 Leigh 333; *Stone v. Hackett*, 12 Gray 227; *Hackney v. Vrooman*, 62 Barb. 650; *Montgomery v. Miller*, 3 Redf. 154; *Crittenden v. Ins. Co.*, 41 Mich. 442; *Curry v. Powers*, 70 N. Y. 212; *Blasdel v. Locke*, 52 N. H. 238; *Howard v. The Bank*, 40 Vt. 597; *Gardner v. Merritt*, 32 Md. 78; *Kerrigan v. Rautigan*, *Ibid.*; notwithstanding the ruling in *Young v. Young*, 80 N. Y. 430, and the reasoning by RAPALLO, J.

The question of the creation of a trust on the redelivery of the thing to the donor, or the continued retention by him, seems to be held on the ground that when the gift is made the property, or ownership, passes and vests immediately and irrevocably in the donee, and if the donor subsequently acquires possession, or retains possession after the intention is executed, it is as trustee for the donee: *Bunn v. Markham*, 7 Taunt. 230; *Hurst v. Beach*, 5 Madd. Ch. R. 351; *Duffield v. Hicks*, 1 Dow & C. 1; *Howell v. McIvers*, 4 T. R. 690; *Heath v. Hall*, 4 Taunt. 326; *Jones v. Witter*, 13 Mass. 304; *Dunn v. Snell*, 15 Id. 481; *Crocker v. Whitney*, 10 Id. 316. In *Marston v. Marston*, 1 Fost. (21 N. H. 491), the same doctrine was approved, although in this case it was a delivery of the notes to a third person, to be used for the support of the donee; yet inti-

mating that it would have been good if made direct : *Smith v. Smith*, 7 C. & P. 401. And "sufficient if it appear that the donor intended an actual gift at the time, and evidenced such intention by some act, which may fairly be construed into a delivery : " *Davis v. Ex'rs Davis*, 1 Nott & McCord 225 ; as where the donor "said he had given the property to his daughter, he must be understood to have done it with all the solemnities necessary to constitute a gift ; and the subsequent possession with his consent was sufficient evidence of delivery : " *Bra-shears v. Blassingame*, 1 Nott & McC. 223. "By delivery is not meant actual manual delivery, but any circumstance showing a clear demonstration of the intention to transfer and of the other to accept, and which puts it into his power or gives him authority to take possession, is all that is necessary : *Reid v. Colcock*, 1 Nott & McCord 592. In neither of these cases was there an actual delivery ; the circumstances and the declarations of the donor, constituted the gifts whereby "the jury were authorized to infer from them every thing that was necessary to the consummation of a legal gift, including necessarily the intention to give, the act of giving, the delivery and the con-

sent to accept : " *Reid v. Colcock*, *supra*. As where the jury found that the following words : "I beg you to recollect I have given that horse to my son," constituted a gift without manual delivery : *Fowler v. Stuart*, 1 McCord 504 ; and where the words, "Ellen, recollect that one-half of that property belongs to your brother Ephraim," was held to vest one-half in the brother : *Jones v. McKee*, 3 Pa. St. 496 ; although this was a case of trust, yet the principle is the same.

In Maine this doctrine is limited, holding that while a valid gift of a note or chose in action may be made *inter vivos* or *causa mortis*, without endorsement or other writing, yet such a delivery as the subject is capable of must be made, as where the thing, at the time of the gift, was in the possession of the donee, and his ownership subsequently recognised by the donor : *Wing v. Merchant*, 57 Me. 386, following *Grover v. Grover*, 24 Pick. 261 ; *Borneman v. Sidlinger*, 15 Me. 429 ; and distinguishing *Shower v. Pilck*, 4 Exch. 478 ; *Dale v. Lincoln*, 31 Me. 422 ; *Allen v. Polereczky*, 31 Me. 338.

JNO. F. KELLY.

Washington, D. C.

Louisville Law and Equity Court.

ARNOTT v. WATHEN MASON MANUFACTURING CO.

Where a contract of hiring is made for a time certain at monthly wages, and the servant is tortiously discharged before the expiration of the period of hiring, he cannot immediately recover the entire amount of wages under the contract, both earned and unearned, but he may recover the wages earned, and such recovery will not estop him from bringing an action, after the expiration of the period of hiring, to recover the wages he was prevented from earning under the contract.

DEMURRER to the petition.

The petition alleged that the defendant, by a written contract filed as an exhibit, agreed to pay the plaintiff \$75 a month for the space of one year, from October 10th, 1885, in consideration of